National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

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TAME T.I.C. & United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (TIC-The Industrial Co.), Case Nos. 27-CC-826, 827

111-5000, 133-0100, 133-7200, 560-2575-6713, 560-2575-6721, 560-7520-7550, 560-7540-4001-5050, 560-7540-4040-2500

This case was submitted for advice on the issue of whether the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, herein UA, some 22 of UA's constituent unions, and their agent TAME violated Section 8(b)(4)(ii)(A) and (B), where the coercive conduct consisted of submitting environmental comments to government agencies charged with receiving and responding to them.

FACTS

1. Background

Sometime before 1989, Amax Gold, Inc. and one of its subsidiaries began implementing plans to mine gold and silver on a 200 acre site in a portion of Lassen County, California. The mine is designed to extract gold and silver from both high grade and low grade ores. The low grade ores are to be crushed, and then deposited in a pond where an aqueous solution of cyanide will leach the precious metals out of them. After the precious metals are separated from the cyanide solution, the tailings from the crushed ore and the spent cyanide solution are to be stored until they lose their toxicity.

Amax had acquired some of the land for the mine, but about 60% of the project was to be on public lands. On some date before November 1989, Amax submitted a lengthy plan of operation to a group of Federal Agencies including the Forest Service and the Bureau of Land Management. After public hearings, a tentative Environmental Impact Report/Environmental Impact Statement, herein an EIS was prepared. After considering numerous public comments, the Bureau of Land Management (BLM) prepared a record of decision (ROD), more fully described below.

On some later date, AMAX contracted with The Industrial Company, herein TIC, a nonunion construction contractor, to perform all construction phases of the project. The Region has determined that TAME TIC, hereinafter TAME, is an agent of many UA locals in California and Nevada.[(1)] TAME monitors TIC's activities, researches it, and provides information about it to union contractors and others. TAME has collected various reports involving TIC, such as accidents on TIC's jobs, and lawsuits between TIC, TIC's subcontractors, property owners and others. TAME, which has allied itself with environmental groups, has apparently caused TIC to lose work on two occasions. During the summer of 1991, TAME sent all of the material to TIC, and requested that it confirm or dispute the veracity of the material. TIC denied generally the veracity of the material, but made no specific denials.[(2)]

2. The Instant Dispute

In October 1991, Amax learned that TAME intended to file environmental comments on the project. Esser, an official of Amax, telephoned TAME coordinator Wilson, who said that TAME was a pilot program nationwide performing research on TIC, and existed because there was no central agency to collate OSHA, CALOSHA, and workers' compensation claims. Wilson told Esser that TIC had a terrible safety record, with numerous OSHA violations and workers' compensation claims, and terrible accident statistics. Wilson also complained that TIC hired out-of-area employees, paid low wages and no fringes,

and that only a quarter of TIC's sites were inspected. Wilson said that TAME's major concern at the Lassen site was that Amax had contracted with TIC to do the work, and that if Amax had not hired TIC, TAME would not be involved. Further, TAME would oppose the project as long as TIC was involved, but if Amax removed TIC from the project, TAME would not file comments regarding the Amax permits. Wilson said TAME would have no problem if TAME or a union group oversaw the site's safety. Esser asked for literature on TAME.

Wilson sent Esser both literature on TAME and the requested material on TIC. Wilson's letter of October 15, 1991 stated that TAME "watches out for the interest of public safety and workers in general . . ." It asserted that TIC does not report injuries as required by law to the Mine Safety Administration. It claimed that in general, there are fewer inspections of nonunion facilities than of union ones. It noted that the property owner is legally liable for the environmental conduct of its construction contractor, and further asserted that TIC has had litigation with its subcontractors.

On October 24, Esser met with Wilson. Wilson said that TAME was going to be wherever TIC was, but offered not to file environmental comments if three conditions were satisfied: (1) the UA affiliates must get some work on the project; (2) Amax and TAME would enter into a contract to require TIC to pay the rates that were originally submitted in their bid; and (3) Amax would permit TAME to monitor TIC's OSHA logs and hours of work. However, Wilson also said that he would object to the absence in the EIS of cyanide tanks, because that would create Boilermakers work.[(3)] Wilson told Esser that absent agreement, Wilson would seek an extension of time to file comments on the ROD and the air quality permits. He said he would claim that more than $16 million was necessary to cover Amax's potential Superfund liability. Wilson said he would object to the failure of Amax to buy air quality "offsets." Wilson showed Esser the comments TAME intended to submit.

On October 29, Wilson phoned Esser to see whether Amax had contracted with a union signatory. Esser said that none of the signatory contractors furnished by TAME had mining experience. Wilson told Amax that TAME was considering comments on the effects of acid rain, the possibility of cyanide poisoning, community impact, and the fact that 85% of the TIC employees did not receive medical insurance. Esser said that if Amax reached agreement with TAME, TAME could still file environmental comments. Wilson answered that there would be no reason to file the comments if an agreement were reached.

On November 4, when Wilson and Esser failed to reach an agreement, TAME filed its comments which stated that TIC "has an extremely poor record of hiring local workers", and that its importation of labor from elsewhere would burden both the local schools and police, and also fail to cut local unemployment. TIC, TAME continued, has a poor accident prevention program, and does not provide health insurance for the first 90 days of employment, which would burden local health care providers; has engaged in negligent construction practices; and has permitted toxic substances to injure workers. However, the document also said that TAME was concerned with the impact on air quality, a statement aimed as much as Amax's mining as at TIC's construction. Finally, TAME claimed that the Amax bond was insufficient.[(4)]

On November 20, Wilson phoned Esser and said that TAME was filing comments with a state agency on the air quality permits for the project. Wilson said he believed the comments made a case, and that the stakes had increased. Wilson said that AMAX should get rid of TIC, since once TAME filed the environmental comments with the state agency, it would be difficult for TAME to withdraw them. The TAME comments to the state agency complained about the lack of certain technology and of federally enforceable emissions limits, particularly those involving cyanide, upon Amax. TAME proposed low pollution alternative fuel vehicles to mitigate the increase in emissions.

On December 4, after considering the comments of some 35 groups, BLM issued its ROD which dealt principally with all phases of the operations and ultimate disposition of the mine, rather than with its construction. Thus, the ROD dealt mainly with the adverse effects of the operation of the mine on air, water, wildlife, and nature lovers. However, the ROD also dealt with the socioeconomic impact of the construction of the mine: impacts on local services, housing, property values and surrounding land uses.

The ROD stated generally there would be no unnecessary or undue degradation of the public lands. The ROD stated that BLM had considered a number of options to the EIS, including the no mine option, but decided to permit the mine, subject to certain limitations beyond those to which Amax had already agreed. These limitations related to the waste rock dump and the electric power lines, and required the movement of a lookout tower. The ROD set rules for the transportation, use and storage of cyanide. The ROD recited that during the decisional process BLM did not know the identity of the construction subcontractor,

but stated that the mine operator would be responsible for any conduct of the construction contractor. The ROD required Amax to post a bond of $5.89 million. As to local services, housing, property values and surrounding land uses, the ROD found that there would be no significant adverse impacts, since, inter alia, half the production workforce would come from the area. It found only speculative impact on the local schools which could charge nonresident students, if warranted. As to air quality, BLM said that was properly a matter for the state agency. TAME was given 30 days to appeal the ROD to the BLM state director.

On December 13, Esser said that Wilson's environmental comments would take time to dispose of. TAME said it wanted 5000 hours of work for a signatory contractor, an agreement from Amax never to use TIC again, and that Amax give six propane vehicles to the County, to offset the increase in pollution. This would permit TAME to justify withdrawing its environmental comments. If AMAX agreed to TAME's proposal, TAME would not appeal the ROD, and would withdraw its comments to the state agency.

Esser responded that on the advice of counsel, he refused to enter into any agreement to cease doing business with TIC. Wilson said that he heard Esser say that Amax would not do business with TIC, and that was good enough for Wilson. Esser said that Amax would be stupid to contract with TIC if TAME was going to make environmental comments. By December 16, Wilson said that he too had spoken with his counsel, and that an agreement that Amax cease doing business with TIC might be unlawful. On December 19, Esser reiterated that AMAX could not agree not to do business with TIC. On December 23, Esser agreed to use a signatory subcontractor for at least 5000 hours of work, and to give the county 6 vehicles to offset air pollution. However, it was TIC that engaged the subcontractor and paid for the vehicles.

By letter dated January 27, 1992, Wilson withdrew TAME's comments relating to the county air control permits for the project "in consideration" of measures taken by Amax to reduce environmental impact, and to enhance the socio-economic stability of the local community. TAME did not appeal the ROD. An officer from the state agency informed the Region that TAME's comments were the only ones received, and that they were substantial in nature. However, the county ultimately issued the permits in June 1992.

3. The Union's contentions

The Union claims, inter alia, that the First Amendment, which protects the right to petition the government for redress of grievances, requires dismissal of these charges. The Union specifically contends that Section 8(b)(4) is economic regulation similar to antitrust regulation, and that the Noerr-Penningtonÿline of Supreme Court cases, discussed below, control these cases. The Union would distinguish Bill Johnson's Restaurants v. NLRB[(5)] and Sure-Tan, Inc. v. NLRB,[(6)] as cases protecting the Section 7 and associational rights of employees rather than of employers.

ACTION

We conclude that complaint should issue, absent settlement, alleging that TAME and the local unions of which it is the agent, herein collectively the Union, violated Section 8(b)(4)(ii)(A) and Section 8(b)(4)(ii)(B). Thus, we would place before the Board the question of whether the Union unlawfully filed environmental comments with BLM and the state agency with an object of forcing Amax to enter into an agreement to cease doing business with TIC, and a further object of forcing Amax, a neutral, to cease doing business with TIC, the primary employer. We would argue that neither the First Amendment nor potential conflict with environmental laws precludes such a finding, and would seek a narrowly tailored remedy to avoid First Amendment problems and any possible conflict with state and federal environmental laws. Finally, the charge against the parent International should be dismissed, absent withdrawal, because the Region has concluded that there is insufficient evidence that TAME is an agent of the UA.[(7)]

1. The filing of the environmental comments had unlawful objectives within the meaning of Section 8(b)(4)(A) and (B).

As to Section 8(b)(4)(A), on December 13, Wilson told Esser that TAME wanted Amax to agree never again to use TIC as a construction contractor and if Amax did not enter into such an agreement, TAME would continue to assert its environmental comments to Amax's detriment. Such conduct falls within the literal ban of Section 8(e) and Section 8(b)(4)(A).[(8)] The

agreement would not be saved by the construction industry proviso to Section 8(e) because it did not arise in the context of a collective bargaining relationship between TAME or its Union principals, and Amax.[(9)]

As to Section 8(b)(4)(B), the Union did not limit itself to informing Amax, the neutral, that it would continue to file environmental comments regarding TIC and Amax wherever it found TIC. Instead, since October 24, TAME demanded that Amax cease doing business with TIC; that UA affiliates must get some work on the project; that Amax and the Union enter into a contract to require TIC to pay the rates that were originally submitted in their bid; and that Amax permit the Union to monitor TIC's OSHA logs and hours of work. The Board has found such approaches to a neutral employer to manifest an unlawful secondary objective. [(10)]

2. The filing of the environmental comments constituted coercion within the meaning of Section 8(b)(4)(ii).

As more fully set forth in the facts, the November comments to BLM objected to TIC's "extremely poor record of hiring local workers", and to its importation of nonlocal labor, which would burden both the local schools and police, and which would also fail to cut local unemployment. The comments also objected to TIC's poor accident prevention program, and to its failure to provide appropriate health insurance, which would burden local health care providers. The comments also claimed that TIC had negligent construction practices and exercised substandard care in dealing with toxic substances. If the environmental agencies had found merit in all these comments, the agencies might have required Amax to change its construction contractor, or perhaps to purchase a larger bond, at increased expense to itself. [(11)] Additionally, Amax may have been required to more closely monitor TIC's activities.[(12)] However, the comments to BLM also objected to the impact of the mining operation on air quality, as did the comments to the state agency. These comments, if found meritorious, could have led to a denial of the permits to operate the mine. Finally, the more generalized claim that the Amax bond was insufficient would also, if meritorious, have imposed additional costs on Amax. For the foregoing reasons, the comments were coercive within the meaning of Section 8(b)(4)(ii).

3. The First Amendment does not warrant dismissal of the charges. The Petition clause of the First Amendment reads:

Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.[(13)]

On several occasions, the Supreme Court and the Board have attempted to accommodate the provisions of the NLRA with this constitutional right. In Bill Johnson's Restaurants v. NLRB, supra, the Court first observed that the allegedly unlawful lawsuit was not one which was either preempted or had an "objective that is illegal under federal law."[(14)] The Court concluded that the Board could enjoin such lawsuits. The Court recognized that an employer lawsuit against employees is a "powerful instrument of coercion and retaliation."[(15)] Nevertheless the Court noted that:

In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. Id., at 511.[(16)]

Therefore, the Court held that the First Amendment insulated the filing and prosecution of a reasonably based lawsuit from being enjoined as an unfair labor practice, even if the lawsuit was motivated by an intent to retaliate against employees for exercising their rights under the Act.[(17)] On the other hand, no such considerations protect a lawsuit that lacks a reasonable basis, and the prosecution of such a suit is, if improperly motivated, an unfair labor practice that may be enjoined by the Board.[(18)] On remand, the Board found that the employer had violated the Act by maintaining a business interference claim because the state court granted summary judgment to the employees.[(19)] However, as to the libel claims, which the parties had settled by stipulating to a dismissal of the suit with prejudice, and with payment by the employer of the employees' legal expenses, the Board found that the General Counsel had failed to show that the suit was baseless. The Board expressly refused to act as "state court triers of fact." [(20)]

In Sure-Tan, Inc. v. NLRB,[21] after the employees selected a union in a Board election, the employer, who long knew that some of his employees were undocumented aliens, wrote a letter to the Immigration and Naturalization Service and asked it to check the status of its employees. INS checked, and then caused the aliens to be deported. The Board treated the deportations as constructive discharges. The Court agreed with the Board that the employer had violated the Act, and rejected the employer argument that its conduct was protected by the First Amendment.[22] The Court distinguished Bill Johnson'sÿon the grounds that (1) unlike Bill Johnson's, the Sure-Tan employer suffered no legally cognizable wrong and did not invoke the INS process "to seek the redress of any wrong committed against [Sure-Tan]", and (2) in Bill Johnson'sÿthere was a deeply rooted state interest, while there was no conflict between the policies of the INS and the NLRA.

In Teamsters Local 705 (Emery Air Freight), [23] the union, in the context of unlawful secondary picketing, also filed a grievance alleging that the employer had violated the subcontracting restrictions in the collective-bargaining agreement. The Board found that the filing of the grievance violated Section 8(b)(4)(ii)(B) in that its object was to force Emery (the neutral) to cease doing business with the primary (the subcontractors). Assuming that a Bill Johnson's analysis was otherwise applicable to the filing of a grievance, the Board held that the grievance had an unlawful "objective" within the meaning of footnote 5 of Bill Johnson's.[24] In Boston Deliveries,[25] the Board found that the union's entire course of conduct, which included striking and picketing as well as grievance filing, violated Section 8(b)(4). The First Circuit, in enforcing the Board order, went further and concluded that the union's grievances alone were violative since they were for an unlawful object.[26]

Most recently, in Teamsters Local 776 (Rite Aid), [27] the Board found that the union violated the Act by seeking judicial enforcement of an arbitral award which was in direct conflict with a Board UC determination and, therefore, the suit had an "illegal objective." Thus, the union's motive and the reasonableness of the lawsuit which are relevant to a Bill Johnson's analysis were inapplicable because the union's lawsuit had an "unlawful objective". [28] According to the Board, the Bill Johnson's requirement of "retaliatory motive" is separate and apart from "unlawful objective", and the former

refers to actual motive of the respondent-plaintiffs in filing the suit. If the actual motive of the lawsuit is to retaliate against or frustrate the exercise of a statutory right, that component of the general rule has been met. As a separate matter, the Court said it was not dealing with a suit that had an illegal object. Accordingly, it is clear that the Court intended the phrase "illegal objective" to mean something other than "retaliatory motive."[29]

The Board further stated that a respondent could manifest an "illegal objective" in situations other than a lawsuit aimed at achieving a result that is incompatible with a prior Board ruling, and noted the Supreme Court's example in footnote 5 of Bill Johnson's of a lawsuit to collect fines that could not be lawfully imposed under the Act.[30]

4. Application of the foregoing principles.

We would argue that the Union's conduct was unlawful whether it is analyzed under Sure-Tan or footnote 5 of Bill Johnson's. Thus, in Sure-Tan, the conduct of the respondent, sending a letter to INS, was successful in that the INS deported the undocumented aliens. Hence the letter was arguably analogous to a "meritorious" lawsuit. Nonetheless, the Court agreed that the conduct was a violation. The distinctions the Court drew between Sure-Tan and Bill Johnson's, namely that the Sure-Tan employer suffered no legally cognizable personal wrong while in Bill Johnson's the employer was asserting a personal interest in its own reputation, indicate that this case is closer to Sure-Tan. As to the legally cognizable personal wrong, the Union here suffered none. And while the regulations of the Council on Environmental Quality (CEQ) and the BLM conferred standing on the Union to comment, it can also be said that public policy favoring the enforcement of federal statutes conferred standing on the Sure-Tan employer to send the letter it sent to INS. Moreover, there is no conflict between the environmental policies and the policies of the Act.[31]

Analyzing the Union's environmental comments under Bill Johnson's, we would argue that TAME's conduct should not be analyzed under the general rule of Bill Johnson's which requires retaliatory motive and a baseless claim. Dismissal of the instant charges would be required under that rule if the 8(b)(4)(B) "object" were found to be an unlawful "motive", as it cannot be concluded that TAME's comments were baseless. A finding of "illegal objective" would make the filing of the environmental comments unlawful regardless of their merit. In Emery Air Freight, the Board found an illegal object within the

meaning of footnote 5 because the filing of a grievance, along with other conduct, was for an 8(b)(4) object. The reviewing court disagreed, and the Board has not indicated whether it will adhere to its original Emery rationale. Then, in Rite Aid, the Board distinguished "retaliatory motive", which involves subjective intent, from "illegal objective". It is not clear how the Rite Aid test can be applied to 8(b)(4) cases, where all the statute requires is "an" unlawful object. Further, we recognize that other than Emery, the Board to date has found that a lawsuit has an illegal objective only if, on its face, it seeks a result proscribed by the Act(32) or contrary to a prior Board determination.(33) We believe that this unsettled and close question should be resolved by the Board, and would make the following argument.

In the instant matter, the evidence clearly shows that the filing of the Union's environmental comments was for the illegal objective of interfering with the business relationships between Amax and TIC. In this regard, the Union was willing to forgo filing their comments if Amax would alter that business relationship and therefore, these actions were for an illegal objective under the Act.

As noted above, the Board in Rite Aid spelled out a definition of "retaliatory motive" and distinguished it from "illegal objective". But, the Board did not define the latter. We would argue, as the Board stated, that "retaliatory motive" refers to the actual motive for the filing of a lawsuit; that is, why was it filed. If a suit is filed to retaliate for the exercise of rights under the Act, then the retaliatory requirement of Bill Johnson's has been met. On the other hand, if the suit seeks an end result which is illegal under the Act, the requirement of footnote 5 is met and Bill Johnson'sÿdoes not apply. In short, (1) when an employer files a suit to get back at employees or their representative for engaging in protected activities, the case must be analyzed using a Bill Johnson's rationale of retaliatory motive/reasonable basis; and (2) when the suit, regardless of motive, seeks a result that is at odds with the Act, the footnote 5 illegal objective takes the case out of Bill Johnson's. Therefore, the present case falls into the latter situation because TAME's filing with the governmental agencies was for the illegal object under 8(b)(4) of forcing the neutral (Amax) to cease doing business with TIC and to force Amax to enter into an illegal 8(e) agreement.

In our view, the Union's argument that a narrow, Noerr-Pennington "sham" must be established in order for its filing environmental comments to be unlawful under Section 8(b)(4), is without merit. In making this argument, the Union relies on Supreme Court cases which state that regardless of a person's anticompetitive motive or lack of success when he petitions the government for an anticompetitive object, his proceeding before the government does not constitute an antitrust violation unless it is a "sham", i.e., an attempt to keep his competitor from being heard by the government.(34) However, the Supreme Court has also indicated that the "sham" Noerr-Pennington exception need not be construed so narrowly. In California Motor Transport Co. v. Trucking Unlimited,(35) the Court considered it to be "well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute. (Citation omitted.)" The Court went on to state that a carrier's "purpose to eliminate an applicant as a competitor by denying him free and meaningful access to the agencies and courts may be implicit" in the exercise of the carrier's right of access to agencies and courts to defeat applications of its competitors, but that "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' (citation omitted) which the legislature has the power to control."(36)

However, even assuming that the Noerr-Pennington "sham" exception is narrowly construed in the antitrust field, we believe that Bill Johnson's strikes a different accommodation between First Amendment considerations and the NLRA. In Bill Johnson's, the Supreme Court described California Motor Transport v. Trucking Unlimited, supra, a Noerr-Pennington "sham" exception case, and then stated: "[w]e should be sensitive to these First Amendment values in construing the NLRA in the present context."(37) Thus, the principles of Bill Johnson's are based upon the First Amendment right of access as set forth in Noerr-Pennington cases. Nevertheless, unlike the arguably narrow Noerr-Pennington sham exception, which essentially is limited to lawsuits constituting an abuse of process, lawsuits which lack a "reasonable basis" can be condemned as unfair labor practices because "baseless litigation is not immunized by the First Amendment right to petition."(38) In Bill Johnson's itself, the Supreme Court stated:

"The first amendment interests involved in private litigation - compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts - are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition." (Footnote omitted.)(39)

Moreover, as to whether a lawsuit lacks merit, in Bill Johnson's Restaurants on remand, the Board noted the Supreme Court's admonition that deference should be given to the state court judgment unless the plaintiff can provide a cogent explanation for refusing to do so.[(40)] The Board has consistently applied this principle without regard to the nature of the state court judgment adverse to the plaintiff.[(41)] Thus, when a lawsuit is no longer pending and the plaintiff did not prevail, the Board does not address whether the lawsuit lacked a reasonable basis in fact and law, but proceeds to determine whether the lawsuit was filed with a retaliatory motive. [(42)] Accordingly, although Bill Johnson's principles were based on the same First Amendment considerations underlying the Noerr-Pennington line of cases, Bill Johnson'sÿcounterpart to the Noerr-Pennington "sham" exception, i.e. lack of reasonable basis, clearly allows less First Amendment insulation from violating the NLRA, as opposed to violating the antitrust laws, when plaintiffs do not prevail on the merits of their claims.

Further, the Union's reliance on USS-Posco Ind. v. Contra Costa Council[(43)] does not warrant a contrary result. In that case, the plaintiff-property owner, which had engaged a nonunion construction contractor to modernize a steel facility, allegedly was a neutral in the dispute between the union and the nonunion contractor. The complaint alleged that the unions violated Sections 303, 8(b)(4)(A) and (B) of the Act by, inter alia, lobbying the county to enact a toxic waste ordinance and, after its passage, lobbying for its enforcement against the neutral; filing a lawsuit against the neutral alleging, inter alia, violations of the California Health and Safety Code; and initiating a grievance against a union signatory. The court stated that Bill Johnson'sÿ"adapted [Noerr-Pennington] to the labor context." [(44)] The court assumed that all of the conduct had a retaliatory intent, but found that the lobbying was a genuine effort to influence legislation and law enforcement, and that the grievance, having been successful, was privileged in the same manner as are well-found lawsuits, citing the Court of Appeals decision in Emery Air Freight. The court also found that although the union lost on the merits of the suit, it could not find that the suit lacked reasonable basis because, following the initiation of the lawsuit, Federal OSHA investigated the jobsite and found numerous health and safety violations.

However, while the court found that the union's claims had a reasonable basis, the court never addressed whether the union claims had an illegal objective under footnote 5 of Bill Johnson's and, therefore, the reasonableness of the claims would be irrelevant. Apparently, the court believed it was unnecessary to address the issue since "the complaint alleges nothing unlawful or improper about defendants lobbying activities, except that such activity was coercive under the NLRA. There is no allegation that defendants' activities were other than 'a genuine effort to influence legislation and law enforcement practices.'" [(45)]

Moreover, even if the Union is correct that the Noerr-Pennington "sham" exception is narrow, and that Bill Johnson's contains a similarly narrow exception to the First Amendment rights of plaintiffs under the NLRA, we would again note that our principal argument regarding the Union's Section 8(b)(4) violation is based on the Supreme Court's decision in Sure-Tan. That case, unlike Bill Johnson's, did not draw upon the First Amendment considerations set forth in Noerr-Pennington. In fact, the Sure-TanÿCourt agreed with the Board that the employer violated Section 8(a)(3) by specifically holding that Bill Johnson's was distinguishable from, and therefore inapplicable to, Sure-Tan.

Finally, the remedy to be sought should not bar the Union from making environmental comments about TIC, with whom it has a primary dispute, even where the plan of operations is that of a neutral operator. Nor should it bar the Union from commenting on Amax, except in the limited circumstances where it does so with an objective proscribed by Section 8(b)(4)(A) or (B). [(46)] Since BLM has disposed of the Union comments, the Union has not appealed, and the Union has withdrawn its comments to the state agency, the sole remedy should be prospective in nature.

5. Summary

The Region should issue a Section 8(b)(4)(ii)(A) and (B) complaint, absent settlement. In this regard, the Union's environmental comments are allegedly unlawful under Sure-Tanÿand footnote 5 of Bill Johnson's.

R.E.A.

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[1] The Region has found insufficient evidence that TAME is an agent of the UA.

[2] By letter dated August 7 to TIC, TAME claimed a right, under DeBartolo Corp. v. Fla. Gulf Coast Trades, 485 U.S. 568 (1988), to ask potential customers not to do business with TIC. It said that "We want to be scrupulously correct because we want to be credible with potential customers of" TIC. By letter dated August 8, TIC said that it would hold TAME responsible for loss of customers.

[3] According to the BLM ROD, the proposed tanks would hold 5.5 million gallons of the aqueous cyanide solution. They would have cost the project $3.6 million. The ROD disapproved the requirement, which it described as relatively new technology, apparently because of its cost and novelty and also because hydrogen cyanide gases might accumulate in the tanks.

[4] The bond assures that Amax and its construction contractor will comply with various environmental regulations.

[5] 461 U.S. 731 (1983).

[6] 467 U.S. 883 (1984).

[7] [*FOIA Exemption 5*].

[8] Cf. Los Angeles Mailers Union No. 9, I.T.U. (Hillbro Newspaper), 135 NLRB 1132 (1962), enfd. 311 F.2d 121 (D.C. Cir. 1962).

[9] Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975).

[10] Int'l Brotherhood, Electric Workers, Local 11 (L.G. Electric), 154 NLRB 766 (1965); Plumbers, Local 32 (A&B Plumbing), 171 NLRB 498 (1968); Local No. 441, Electrical Workers (Rollins Communications), 222 NLRB 99 (1976), enfd. ___ F.2d ___, 97 LRRM 3228 (D.C. Cir. 1977). Cf. Local 453, IBEW (Southern Sun Electric Corp.), 237 NLRB 829 (1978), petition for review denied 620 F.2d 170 (8th Cir. 1980).

[11] Cf. International Longshoremen's Association, 266 NLRB 230, 233 (1983), revd. 473 U.S. 61 (1985) (fine of $1000).

[12] Cf. NLRB v. Local 825, Operating Engineers (Burns and Roe), 400 U.S. 297 (1971).

[13] See generally, McDonald v. Smith, 472 U.S. 479 (1985), where the defendant sent letters to the President attacking the plaintiff while the President was considering the plaintiff for a position as a United States Attorney. The Court held that there is no absolute immunity under the petition clause, but that the plaintiff must show Times v. Sullivan malice.

[14] 461 U.S. at 737, fn. 5.

[15] 461 U.S. at 740.

[16] 461 U.S. at 741.

[17] 46l U.S. at 740-44. See also Phoenix Newspapers, Inc., 294 NLRB 47 (1989).

[18] 461 U.S. at 740-744. See also Vanguard Tours, 300 NLRB 250, 254-56 (1990) (application of Bill Johnson's where state court lawsuit is no longer pending, but was withdrawn without adjudication on the merits); Summitville Tiles, 300 NLRB 64, 65-66 (1990) (where state court suit dismissed for lack of merit, the Board must still consider whether suit was filed for retaliatory purpose).

[19] 290 NLRB 29, 31 (1988).

[20] Id. at 32.

[21] 467 U.S. 883 (1984).

[22] 467 U.S. at 896, and fn. 6.

[23] 278 NLRB 1303 (1986), remanded 820 F.2d 448, 125 LRRM 2705 (D.C. Cir. 1987).

[24] The D.C. Circuit took issue with the Board's finding that the union's objective in filing the grievance was secondary and that, accordingly, the grievance was unlawful. The court remanded

the case for a determination as to the legality of the contract provision that the union was seeking to enforce. 125 LRRM at 2708-2709. The case subsequently settled.

[25] 282 NLRB 910 (1987), enfd. 831 F.2d 1149, 126 LRRM 2886 (1st Cir. 1987).

[26] However, it is an open issue with the Board whether grievance filing alone violates Section 8(b)(4)(B). See Elevator Constructors (Long Elevator), 289 NLRB 1095, fn. 3 (1988) (Board finds illegal objective, citing Emery, where grievance construed contract clause in violation of Section 8(e); Member Babson found it unnecessary to decide whether grievance filing can constitute 8 (b)(4)(ii) coercion in other situations); Teamsters Local 483 (Ida Cal), 289 NLRB 924, 925, fn. 1 (1988) (Chairman Stephens and Members Cracraft and Babson all agree that Emery was distinguishable and found it unnecessary to decide whether it was correctly decided).

[27] 305 NLRB No. 114 (December 11, 1991), enfd. ___ F.2d ___, 141 LRRM 2176 (3d Cir. 1992).

[28] Bill Johnson's, supra, 461 U.S. at 737, fn. 5.

[29] 305 NLRB No. 114, slip op. at 4.

[30] Id., slip op. at 4, fn. 7.

[31] See, e.g., The National Environmental Policy Act of 1970 (NEPA), 42 U.S.C. Sec. 4332, and the CEQ Regulations, 40 C.F.R. Sec. 1500.2(a), which require only that federal agencies must, to the fullest extent possible, interpret and administer federal policies, regulations and laws in accord with the policies set forth in NEPA.

[32] See, e.g., Elevator Constructors (Long Elevator), supra, 289 NLRB at 1095 (union violated Section 8(b)(4)(ii)(A) by filing a grievance that is predicated on a reading of a clause in a collective-bargaining agreement "that would convert it into a de facto hot cargo provision, in violation of Section 8(e)"); NLRB v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213 (1972) (Board properly enjoined unions from prosecuting state court lawsuits for the enforcement of fines that could not be lawfully imposed under Section 8(b)(1)(A)).

[33] See Rite Aid, supra.

[34] See Eastern Railroad Presidents' Conference v. Noerr Motor Freight, 365 U.S. 127, 135, 139, 144 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); City of Columbia v. Omni Outdoor Advertising, Inc., 111 S.Ct. 1344, 1355 59 USLW 4259 (April 2, 1991). Accord: Oregon Natural Resources Council v. MOHLA, 944 F.2d 531, 533-535 (9th Cir. 1991).

[35] 404 U.S. 508, 514 (1972).

[36] Id. at 515.

[37] 731 U.S. at 741.

[38] Id. at 743.

[39] Id., at fn. 10, quoting Balmer, Sham Litigation and the Antitrust Laws, 29 Buffalo L. Rev. 39, 60 (1980); "Accord, Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252, 1265-1266 (CA9 1982); Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 101 (1977)".

[40] Bill Johnson's Restaurants, 290 NLRB 29, 31 (1988), citing 461 U.S. at 749 fn. 15.

[41] See Summitville Tiles, supra, 300 NLRB at 65-66, and H. W. Barss, 296 NLRB 1286, 1287 (1989), citing Phoenix Newspapers, supra (summary judgment); Machinists Lodge 91 (United Technologies), 298 NLRB 325, 326 (1990) (dismissal on the merits); Vanguard Tours, supra, 300 NLRB at 254-256 (withdrawal of lawsuit).

[42] Summitville Tiles, supra, at 66.

[43] 692 F. Supp. 1166, 129 LRRM 2195, 721 F. Supp. 239 (N.D. Cal. 1988, 1989).

[44] 129 LRRM at 2197.

[45] Id., citing Noerr, 365 U.S. at 144.

[46] For example, the Union's attempt to have BLM require that Amax use cyanide holding tanks, which would require Boilermakers work, was primary as to Amax.